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7 ANTHONY ALEXANDER JAMES,
8 Plaintiff,
9 v.
10 UNITED FURNITURE WORKERS
11 LOCAL 89262,
12 Defendant.

Case No. [21-cv-03893-JCS](#)

**ORDER REGARDING MOTION TO
DISMISS**

Re: Dkt. No. 4

I. INTRODUCTION

Plaintiff Anthony Alexander James brought this action asserting various claims against Defendant United Furniture Workers Local 89262 (the “Union”) related to the Union’s representation of James during his employment and subsequent termination at Sealy Tempur-Pedic (“Sealy”).¹ The Union now moves to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed below, the Union’s motion is GRANTED, and James’s complaint is DISMISSED with leave to amend no later than September 24, 2021.²

II. BACKGROUND

A. Procedural History

James initially filed this action pro se in the California Superior Court for Alameda County. *See generally* Compl. (dkt. 1-1). He asserted state law claims including negligence, fraud, and race discrimination under California’s Fair Employment and Housing Act (“FEHA”).

¹ James’s employer was named in a previous lawsuit as “Tempur Sealy International, Inc.” Resolving which name is correct is not material to the outcome of the present motion.

² The parties have consented to the jurisdiction of a magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

1 *Id.* at 6–7, 10–12. The Union removed the case to federal court on May 24, 2021. Not. of
2 Removal (dkt. 1).

3 **B. James's Complaint**

4 Because a plaintiff's factual allegations are generally taken as true on a motion under Rule
5 12(b)(6), this section summarizes the allegations of James's complaint as if true. Nothing in the
6 order should be construed as resolving any issue of fact that might be disputed at a later state of
7 the case.

8 James, an "African American male," Compl. at 10,³ worked as a driver for Sealy, a
9 mattress business, from 2011 until he was terminated by Sealy in 2016. Compl. at 9–10. The
10 Union represented employees at Sealy who paid union dues. *Id.* Some time prior to James's
11 termination in 2016, Sealy forged documents that suggested that he had been suspended from his
12 job at Sealy three separate times—suspensions that had not actually occurred. *Id.* at 9, 11. On the
13 basis of the inaccurate information in the forged documents and James having clocked in three
14 minutes early on March 22, 2016, Sealy terminated James. *Id.* James alerted the Union of his
15 termination and the forged documents, and the Union informed James that it would file a
16 grievance on James's behalf. *Id.* at 9. Three months after James's termination, the Union notified
17 James that they would not be able to help him; the Union based this determination on the forged
18 documentation indicating that James was suspended three times. *Id.*

19 James subsequently reached out to the National Labor Relations Board ("NLRB") to seek
20 help. *Id.* The NLRB contacted the Union, and a meeting was set up to review James's personnel
21 files, at which time the Union became aware that the documentation of James's suspensions
22 lacked necessary signatures. *Id.* However, James alleges that the Union was aware of the "act"
23 prior to this meeting. *Id.* at 11. James requested that the Union direct Sealy to reinstate him in his
24 previous position and compensate him with back pay. *Id.* at 9. Instead, James was offered less

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³ James's complaint consists of multiple documents (including state court forms, a document
27 labeled "attachment" that contains factual allegations and a demand for payment, and copies of
several emails and other supporting documentation) without any clear page or exhibit numbering.
28 This order therefore cites pages of the complaint and its attachments using the page numbers
assigned by this Court's ECF filing system to docket entry 1-1.

1 money than he was requesting and was asked to agree to a “Last Chance contract” and drug
2 testing. *Id.* James declined the deal and asked the Union to take his grievance to arbitration. *Id.* at
3 9–10. James was then terminated. *Id.* at 10.

4 In 2019, James sued Sealy. *Id.*; see *James v. Tempur Sealy Int'l, Inc.*, No. 18-cv-07130-SI
5 (N.D. Cal.). During that litigation, which eventually settled,⁴ James and his attorneys discovered
6 that the Union and Sealy corresponded about James’s three forged suspension documents prior to
7 James’s termination. Compl. at 9. James alleges that “non-African American[s] . . . have options
8 . . . based on [the] union employee contract” that were not accorded to James, including filing
9 grievances, meeting with union representatives about disciplinary actions, and securing union
10 witnesses to disciplinary actions. *Id.* at 11. James further alleges that Sealy fired him based on
11 information that the Union knew was false and without the Union taking his case to arbitration,
12 none of which would have happened if James was “non-African American.” *Id.* According to
13 James’s complaint, a “majority of the African American driver[s] [felt] discrimination,” and there
14 was at least one other African American driver who was terminated by Sealy under similar
15 circumstances with the Union’s knowledge. *Id.* at 12.

16 In emails and other documents attached to James’s complaint, Union personnel and
17 attorneys state that although Sealy acknowledged wrongdoing and fired a supervisor who forged at
18 least one signature, negotiations with Sealy were undermined by confrontational interactions
19 between James and other Sealy employees, and the Union intended to withdraw its grievance if
20 James did not accept a \$10,000 settlement offer. *Id.* at 14–21. Viewing the complaint in the light
21 most favorable to James, the Court understands the inclusion of those documents as alleging that
22 they existed, but not as alleging the truth of their contents—in particular, for the purpose of this
23 motion to dismiss, the Court does not take as true the Union’s statements that James acted
24 confrontationally.

25 Various portions of James’s complaint differ as to the claims he is asserting. A state court
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27 ⁴ The undersigned magistrate judge served as the settlement judge for the previous case against
28 Sealy. At the hearing on August 13, 2021, James and the Union consented to the undersigned
presiding over this case despite that previous role.

1 civil cover sheet indicates that he is asserting claims for unfair business practices, defamation,
2 fraud, and wrongful termination. *Id.* at 3. The first page of his state court form complaint
3 indicates that he is asserting a contract claim. *Id.* at 4. Other portions of the form complaint
4 indicates that James is asserting a fraud claim based on “Intentional or Negligent
5 Misrepresentation . . . On Wrongful Termination” and false promise, and a negligence claim. *Id.*
6 at 6–8. The narrative portion of James’s complaint asserts a claim for race discrimination under
7 FEHA. *Id.* at 10–11. Near the end of the narrative portion of his complaint, James refers to
8 claims for unfair business practices, misrepresentation, race discrimination, and negligence. *Id.* at
9 12. James attaches a notice of right to sue issued by the Equal Employment Opportunity
10 Commission (“EEOC”) on January 21, 2021. *Id.* at 22. James states that he would like to settle
11 his claims for \$200,000. *Id.* at 12.

12 **C. The Union’s Motion to Dismiss**

13 The Union moves to dismiss James’s complaint on the basis that his complaint is factually
14 vague, and that the claims which are identifiable are preempted by federal law and barred by the
15 statute of limitations. *See Mot.* (dkt. 4).

16 The Union argues that all of James’s claims are preempted by the Union’s duty of fair
17 representation under section 9 of the National Labor Relations Act (“NLRA”). *Id.* at 5 (citing 29
18 U.S.C. § 159). The Union cites Supreme Court precedent holding that a union’s duty of fair
19 representation requires it ““to represent all members . . . without hostility or discrimination toward
20 any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct.””
21 *Id.* (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)) (ellipsis in original). The Union contends
22 that this statutory duty preempts any state regulation of union activity “performed in the
23 negotiation, administration, and enforcement of a collective bargaining agreement . . . including
24 handling employee grievances.” *Id.* (citing *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 67
25 (1991); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986)). Because James bases his
26 complaint on the Union’s decision not to take James’s grievance to arbitration, the Union argues
27 that James’s claim is based entirely on actions which fall within the scope of the Union’s duty of
28 fair representation. *Id.* at 7.

1 The Union argues further that, once James's claims are properly construed as preempted by
2 federal law, each of James's claims is barred by the NLRA's six-month statute of limitations,
3 which "generally begins to run when an employee knows or should know of the alleged breach of
4 duty of fair representation by a union." *Id.* at 7–8 (quoting *Galindo*, 793 F.2d at 1509, and citing,
5 e.g., *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169 (1983)). Because James's claims
6 arise out of actions which the Union allegedly took in 2016 and which James must have been
7 aware of no later than the August 4, 2020 settlement of his case against Sealy, the Union contends
8 that James's filing of his complaint on April 12, 2021 fell outside the limitations period.⁵ *Id.* at 8–
9 9. The Union concludes that the Court should dismiss without leave to amend because the
10 complaint is "clearly and unequivocally time-barred." *Id.* at 14.

11 The Union argues in the alternative that, even if James's claims were not time barred,
12 James does not plead sufficient facts to support his claims. *Id.* at 10. According to the Union,
13 "Plaintiff's own Complaint... shows that the Union acted reasonably and in good faith in
14 processing and settling [James's] grievance." *Id.* at 11–12. The Union contends that the exhibits
15 that James attached to the Complaint establish that James's engaged in "intemperate conduct"
16 when asked to take a drug test, and that he "acted in a threatening and angry manner towards
17 Company representatives, causing the Company to rescind its offer of reinstatement." *Id.* at 11.
18 The Union further contends that it chose not to take James's request for reinstatement to
19 arbitration based on a "reasonable belief that an arbitrator would be unlikely to order reinstatement
20 given [James's] aggressive and inappropriate behavior towards the employer." *Id.* The Union
21 argues that the attachments to James's complaint demonstrate that Union evaluated James's case
22 fairly and negotiated with Sealy on James's behalf in good faith. *Id.* Based on these contentions,
23 the Union argues that James cannot make out a prima facie case of the Union's breach of the duty
24 of fair representation, as under Ninth Circuit law, such a breach occurs when a union's actions are
25 "either 'arbitrary, discriminatory, or in bad faith.'" *Id.* at 10 (quoting *Simo v. Union of*

26 _____
27 ⁵ The Union also argues that the details of James's complaint reveals that he knew of the alleged
28 forgeries, the Union's refusal to take his grievance to arbitration, and the Union's purported
knowledge of the forgery of James's names on the disciplinary documents as far back as 2016.
Mot. at 8 & n.3.

1 Needletrades, 316 F.3d 974, 981 (9th Cir. 2003)).

2 With respect to James's allegation that the Union allowed Sealy to forge his signature on
3 disciplinary documents, the Union argues that this allegation runs afoul of the standard articulated
4 in *Iqbal* that “[n]aked assertions devoid of further factual enhancement” are inadequate. *Id.* at
5 12–13 (quoting *Iqbal*, 556 U.S. at 678). The Union contends that James's allegation of disparate
6 treatment of African American employees are similarly conclusory. *Id.* at 13. The Union also
7 once again argues that because it based its decision not to pursue James's grievance on the fact
8 that James purportedly became hostile towards Sealy management, the Union's decision was
9 reasonable and not based in a discriminatory intent. *Id.* at 13–14.

10 **D. James's “Motion Not to Dismiss”**

11 In a filing titled “Motion Not to Dismiss,” which the Court construes as an opposition brief
12 filed pursuant to Civil Local Rule 7-3(a), James does not respond to the Union's arguments and
13 instead asserts a new set of facts and advances new legal theories. *See Mot. Not to Dismiss*
14 (“Opp'n,” dkt. 8). James asserts that he “worked hard in his job” for Sealy, and that his manager
15 up until 2014, Dave McKenzie, thought highly of his work and gave him a pay raise and an
16 excellent performance review. *Id.* at 3. James asserts that customers and other senior managers
17 also felt positively about his work at Sealy. *Id.* James describes his job as requiring him to
18 inspect the truck he drove to deliver mattresses and record information related to this task in a
19 logbook. *Id.* At some point towards the end of 2015, Sealy changed James's logbook to an
20 electronic format from a paper format. *Id.* at 4. According to James, this electronic system did not
21 reliably record information, and it was this defect that sparked the conflict between James and
22 Sealy that led to James's termination. *Id.*

23 James asserts that on March 21, 2016, he used the electronic system to log into work three
24 minutes prior to the start of his shift, but when he realized his mistake and attempted to log out
25 without starting work in order to log back in five or ten minutes later, the electronic system would
26 not allow him to do so. *Id.* James states that he then called and texted his manager, Lester
27 Sequeira, to request assistance and advice on how he should proceed, but Sequeira did not
28 respond. *Id.* James decided to begin his job anyway using a paper log, and he made deliveries

1 throughout that day. *Id.* According to James, Sequeira asked James to meet with him and human
2 relations manager Ryan Degooyer on March 22, 2016 about James's "violation" of clocking in
3 three minutes earlier the previous day. *Id.* James states that he was informed he would be
4 suspended for two days, but in fact did not work for an entire month after the meeting, and when
5 he contacted union representative Ulises Vergara to file a grievance, no one followed up with him.
6 *Id.*

7 James asserts that a month after his March 21, 2016 purported violation, Sequeira met with
8 James to ask James to sign "termination papers," and James noticed that Sealy had documentation
9 of two additional suspensions that did not take place. *Id.* at 5. James states that he again reached
10 out to Vergara in order to file a grievance, but Vergara chose not to respond to James's request
11 until July 14, 2016, when Vergara responded with a letter contending that James was suspended
12 from Sealy for two days in December 2015 and two days in January 2016, and that because James
13 had three suspensions within a 12-month period, James's termination occurred in accordance with
14 Sealy's "driver manual." *Id.* Based on these contentions, Vergara declined to meet with James
15 about filing a grievance or setting up an arbitration. *Id.*

16 James states that he then reached out to the NLRB to request personnel files held by Sealy,
17 and Vergara met with him in August of 2016 to view these files. *Id.* According to James, he and
18 Vergara discovered that the purported suspensions on December 14, 2015; December 15, 2015;
19 and January 25, 2016 "were sign[ed] by someone other than Mr. James," forging his signature. *Id.*
20 James further contends both that no union witness signed these documents despite a contractual
21 obligation to do so and that the Union was aware that Sealy forged James's name on the
22 documents. *Id.* at 5–6.

23 James states that at some point later, Sealy and the Union presented him with a settlement
24 offer contingent upon completing a "hair test," which James refused, and that he was then
25 terminated by Sealy. *Id.* at 6. In his "Motion Not to Dismiss" James asserts the following claims,
26 some of which also appear in his complaint: wrongful termination in violation of public policy,
27 breach of contract (citing 41 U.S.C. § 6503), fraud, and retaliation in violation of FEHA. *Id.* at 6–
28 10. James asserts that that he filed a timely FEHA charge with the Department of Fair

1 Employment and Housing, citing “Exhibit A,” but this filing includes no exhibits. *See id.* at 10.

2 **E. The Union’s Reply**

3 In its reply brief, the Union argues that James’s new allegations and legal theories set forth
4 in his “Motion Not to Dismiss”—including the details purportedly leading to his termination and
5 his purported exhaustion of state administrative remedies—cannot be considered in resolving the
6 motion to dismiss, which turns on the sufficiency of James’s complaint. Reply (dkt. 12) at 2–3.
7 The Union contends that James’s new legal theories of intentional infliction of emotional distress
8 (which he cites in passing in an introductory section of his response, but does not clearly assert as
9 a claim) and retaliation under FEHA should not be considered because they are not present in his
10 complaint. *Id.* at 3.

11 The Union argues in the alternative that, even if the new allegation and legal theories were
12 considered, all of James’s claims would be preempted under the Union’s federal duty of fair
13 representation because they arise out of the Union’s conduct representing James, and all are barred
14 by the six-month statute of limitations for asserting such a claim. *Id.* at 3–4. The Union also
15 argues that James’s allegations in both his complaint and his “motion not to dismiss”—including
16 that the Union was aware of the purported forgeries of James’s signature, that the Union itself
17 falsified information on the disciplinary documents, and that the Union discriminated against
18 James based on his race—fail to meet the plausibility standard required by Supreme Court
19 precedent. *Id.* at 5–6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)).

20 **III. ANALYSIS**

21 **A. Legal Standard**

22 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure
23 for failure to state a claim on which relief can be granted. “The purpose of a motion to dismiss
24 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*
25 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage
26 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a “pleading which
27 sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing
28 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and takes “all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must “contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (alteration in original). Rather, the claim must be “‘plausible on its face,’” meaning that the plaintiff must plead sufficient factual allegations to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 570).

Pro se pleadings are generally liberally construed and held to a less stringent standard. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Even post-*Iqbal*, courts must still liberally construe pro se filings. *Hebbe v. Pliler*, 627 F.3d 338 (9th Cir. 2010). As the Ninth Circuit explained in *Hebbe*, “while the standard is higher, our obligation remains, where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Id.* at 342. Nevertheless, the court may not “supply essential elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

If the Court dismisses a complaint under Rule 12(b)(6), it should “grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could

1 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
2 Cir. 2000) (en banc) (internal quotation marks and citations omitted). In general, courts “should
3 freely give leave when justice so requires.” *Id.* Further, when it dismisses the complaint of a pro
4 se litigant with leave to amend, “the district court must provide the litigant with notice of the
5 deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend
6 effectively.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting *Ferdik v. Bonzelet*,
7 963 F.2d 1258, 1261 (9th Cir. 1992)). “Without the benefit of a statement of deficiencies, the pro
8 litigant will likely repeat previous errors.” *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 624
9 (9th Cir. 1988) (quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)).

10 **B. At Least Some of James’s Claims Are Preempted**

11 The Union removed to this Court on the basis that James’s claims are preempted by section
12 9 of the NLRA, which the Supreme Court has long interpreted as imposing a duty “to serve the
13 interests of all members without hostility or discrimination,” not only with respect to negotiating a
14 collective bargaining agreement, but also “in its enforcement of the resulting collective bargaining
15 agreement.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). “The vast majority of duty of fair
16 representation claims arise in the grievance procedure context: the employee claims that a union
17 failed to process a grievance or mishandled its presentation.” *Galindo v. Stoeby Co.*, 793 F.2d
18 1502, 1509 (9th Cir. 1986). The Ninth Circuit has held that this duty of fair representation
19 preempts at least some state law claims that seek to regulate unions’ handling of grievances:

20 The federal statutory duty which unions owe their members to
21 represent them fairly . . . displaces state law that would impose duties
22 upon unions by virtue of their status as the workers’ exclusive
23 collective bargaining representative. State law may “constitute an
24 impermissible obstacle to the accomplishment of purposes of
25 Congress by regulating conduct that federal law has chosen to leave
26 unregulated.” *Condon v. United Steelworkers of Am.*, 683 F.2d 590,
27 594 (1st Cir. 1982). The doctrine of fair representation serves both as
28 a limited check on the arbitrary exercise of union power and, through
its limitations, allows unions wide latitude in effectively serving the
interests of the bargaining unit. *See United Steelworkers of Am. v.
Rawson*, 495 U.S. 362, 374 (1990). To bring a successful state law
action, aggrieved workers must make a showing of additional duties,
if they exist, beyond the normal incidents of the union-employee
relationship. *Id.* Such duties must derive from sources other than the
union’s status as its members’ exclusive collective bargaining

1 representative, such as an express provision of the collective
2 bargaining agreement or a collateral contract. *Id.*

3 *Adkins v. Mireles*, 526 F.3d 531, 539–40 (9th Cir. 2008).

4 Courts have routinely held that the duty of fair representation preempts generic state-law
5 claims that are based on a union’s failure to pursue a grievance or otherwise represent its
6 members’ interests. *See, e.g., id.* at 540–42 (holding claims for breach of contract, breach of the
7 implied covenant of good faith, negligent misrepresentation, and intentional infliction of emotion
8 distress preempted by the duty of fair representation); *Jay v. Serv. Emps. Int’l Union-United*
9 *Health Care Workers W.*, 203 F. Supp. 3d 1024, 1033 (N.D. Cal. 2016) (holding preempted claims
10 for breach of the covenant of good faith and unfair business practices because they “relate[d] to
11 Defendants’ breach of duty to fairly represent Plaintiffs in their capacity as union
12 representatives”); *Wright v. N. Am. Terrazo*, No. C12-2065JLR, 2013 WL 441517, at *5–7 (W.D.
13 Wash. Feb. 5, 2013) (holding claims for negligence, breach of contract, wrongful termination, and
14 others preempted); *Martinez v. Kaiser Found. Hosps.*, No. C-12-1824 EMC, 2012 WL 2598165,
15 at *9 (N.D. Cal. July 5, 2012) (holding a claim for intentional infliction of emotional distress
16 preempted because “the alleged outrageousness of the Union’s actions is, in essence, predicated on
its status as Ms. Martinez’s exclusive collective bargaining representative”).

17 Here, to the extent James asserts claims for breach of contract, *see* Compl. at 4, unfair
18 business practices, *id.* at 3, 12, wrongful termination, *id.* at 3, and negligence, *id.* at 12, all of those
19 theories appear to turn solely on the Union’s failure to pursue a grievance and prevent James’s
20 termination. They are therefore preempted the NLRA’s duty of fair representation.

21 Federal pre-emption is ordinarily a federal defense to the plaintiff’s
22 suit. As a defense, it does not appear on the face of a well-pleaded
23 complaint, and, therefore, does not authorize removal to federal court.
24 . . . One corollary of the well-pleaded complaint rule developed in the
case law, however, is that Congress may so completely pre-empt a
particular area that any civil complaint raising this select group of
claims is necessarily federal in character.

25 *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987). Under such circumstances, courts will
26 “recharacterize a state law complaint displaced by [federal law] as an action arising under federal
27 law.” *Id.* at 64. Since preemption by the duty of fair representation is one such instance of federal
28 law “displac[ing] state law,” *see Adkins*, 526 F.3d at 539–40 & n.4, James’s preempted claims are

1 properly construed as asserted under the NLRA. The Court therefore has subject matter
2 jurisdiction over the case pursuant to 28 U.S.C. § 1331, and the Union's removal was proper.⁶

3 The statute of limitations for a claim for breach of the NLRA's duty of fair representation
4 is six months. *Kolombo v. Hughes Market Inc.*, 886 F.2d 258, 259 (9th Cir. 1989). “[T]he six-
5 month period generally begins to run when an employee knows or should know of the alleged
6 breach of duty of fair representation by a union.” *Galindo*, 793 F.2d at 1509. In the typical case
7 “where a union decides not to file a grievance[,] the cause of action generally accrues when the
8 employee learns or should have learned of the union's decision.” *Id.* Here, the Union declined to
9 pursue a grievance when James was fired in 2016, several years before he filed this case on April
10 12, 2021. *See* Compl. at 3 (cover sheet showing the date of filing); *id.* at 9 (alleging James was
11 fired in 2016); *id.* at 14 (email dated November 1, 2016 indicating that James had one week to
12 decide whether to accept a \$10,000 settlement, and that the union would withdraw the grievance if
13 he did not). Assuming for the sake of argument that James's claim instead accrued at the time he
14 alleges he learned the Union purportedly coordinated with Sealy, James alleges that occurred
15 through discovery “after the company deposition in 2020” in the course of his previous lawsuit
16 against Sealy. Compl. at 10. The Court takes judicial notice that the previous case was dismissed
17 on August 27, 2020 based on the parties' settlement. *See James v. Tempur Sealy Int'l, Inc.*, No.
18 18-cv-07130-SI, ECF Doc. No. 89 (N.D. Cal. Aug. 27, 2020). The previous case terminated more
19 than six months before James filed his present case against the Union, so any claim for breach of
20 the duty of fair representation is time-barred even if the limitations period began to run while the
21 previous case was pending.

22 Accordingly, the Union's motion to dismiss is GRANTED as to James's claims for breach
23 of contract, unfair business practices, wrongful termination, and negligence, all of which are
24 properly construed as claims for breach of the duty of fair representation under section 9 of the

25
26 ⁶ The Court has supplemental jurisdiction over any claims properly asserted under state law
27 pursuant to 28 U.S.C. § 1337. If, after the pleadings are settled, only state law claims remain, the
Court will consider declining supplemental jurisdiction under § 1337(c) and remanding to state
court. At this point, however, when it is not clear if any state law claims are properly asserted or
whether James might be able to amend to state a viable federal claim, remand would be premature.

1 NLRA, and were not filed within the applicable statute of limitations for such a claim. While it is
 2 not clear how James could amend to cure these defects—none of the new allegations in his
 3 “motion not to dismiss” would do so, even if properly alleged in an amended complaint—it is
 4 conceivable that he could allege facts sufficient to support some tolling doctrine for the statute of
 5 limitations, or that he could show that his claims are distinct from the duty of fair representation.
 6 In an abundance of caution, the Court grants leave to amend as to these claims.

7 **C. James’s FEHA Claim Fails to Allege Exhaustion**

8 The claim most clearly asserted in James’s complaint is for discrimination based on race in
 9 violation of FEHA. Compl. at 10–11. FEHA makes it unlawful for a labor organization “to
 10 discriminate in any way against any of its members,” including based on race. Cal. Gov’t Code
 11 § 12940(b).

12 The Union is correct that some district court decisions have held FEHA discrimination
 13 claims, or similar claims under the laws of other states, preempted the NLRA where they arise
 14 from a union’s alleged failure to provide fair representation. Mot. at 6 (citing, e.g., *Guidry v.*
 15 *Marine Eng’rs’ Beneficial Ass’n*, No. C 11-05347 CRB, 2012 WL 646302, *9 (N.D. Cal. Feb. 28,
 16 2012); *Madison v. Motion Picture Set Painters & Sign Writers Loc.* 729, 132 F. Supp. 2d 1244,
 17 1257 (C.D. Cal. 2000)). None of the cases on which the Union relies for this point addressed the
 18 Ninth Circuit’s discussion of the issue in *Adkins*. In an unpublished memorandum disposition,
 19 however, the Ninth Circuit held that a plaintiff’s FEHA claim was preempted by section 310 of the
 20 Labor Management Relations Act⁷ because it implicated the duty of fair representation arising
 21 from a collective bargaining agreement, with Judge Bea concurring that the preemption at issue
 22 was better viewed as arising from “the union’s statutory duty of fair representation,” presumably
 23 referring to section 9 of the LMRA. *See generally Hardine v. Off. & Pro. Emps. Int’l Union*, 475
 24 F. App’x 103 (9th Cir. 2012). Both the majority opinion in that case and the concurrence cited
 25 *Adkins*. *See id.* At least one district court applying *Adkins* has held an analogous discrimination

27 ⁷ The Union has not argued that any claim in this case is preempted by section 301. As a “general
 28 rule . . . FEHA claims are not preempted by section 301.” *Klausen v. Warner Bros. Television*,
 158 F. Supp. 3d 925, 934 n.4 (C.D. Cal. 2016).

1 claim under Washington law preempted. *Wright*, 2013 WL 441517, at *6.

2 On the other hand, in a decision addressing *Adkins*, Judge Chen held that “[w]hile the duty
3 of fair representation may also provide a remedy for the alleged discrimination, that does not mean
4 that the right to obtain a remedy based on an independent source is thereby . . . negated and
5 displaced.” *Martinez*, 2012 WL 2598165, at *7. Accordingly, even though the plaintiff’s claims
6 in that case turned on allegations that her union “failed to file and pursue appropriate grievances,”
7 *id.* at *1, Judge Chen held that FEHA’s establishment of “certain rights not [to] be discriminated
8 against,” independently of rights conferred under the NLRA, was not preempted, *id.* at *7–8. At
9 least one subsequent decision has followed that holding. *Padilla v. Pac. Bell Tel. Co.*, No. CV 14-
10 09760 DDP (JPRx), 2015 WL 728695, at *5 (C.D. Cal. Feb. 19, 2015). The Court is aware of no
11 subsequent decision specifically rejecting it. The Union’s briefs here do not address either
12 *Martinez* or *Padilla*.

13 It is difficult to square Judge Chen’s decision in *Martinez*—that a plaintiff’s FEHA claim
14 was not preempted—with the Ninth Circuit’s non-precedential decision in *Hardine* finding similar
15 claims preempted by either section 301 or the statutory duty of fair representation. While Judge
16 Chen is correct that FEHA imposes a duty not to discriminate separately from any duty arising
17 under the NLRA, in the context of a claim for failure to pursue a grievance, that duty is
18 intertwined with the union’s role as the employee’s representative. It is not a separate obligation
19 voluntarily undertaken by the parties, such as the hypothetical “express provision of the CBA or
20 . . . collateral contract that imposed additional enforceable duties” specifically contemplated in
21 *Adkins*, 526 F.3d at 540, but instead arises from the employee’s status as a member of the union,
22 *see* Cal. Gov’t Code § 12940(b). There is at least an argument that FEHA’s regulation of unions,
23 as applied to claims for failure to pursue a grievance, is the sort of “state law that would impose
24 duties upon unions by virtue of their status as the workers’ exclusive collective bargaining
25 representative” that *Adkins* held preempted. *See* 526 F.3d at 539.

26 In the absence of any argument from the Union addressing the district court decisions
27 rejecting preemption of FEHA claims by the duty of fair representation, this Court declines to
28 resolve whether FEHA’s antidiscrimination provisions, applied in this context, are the sort of

1 state-imposed “duties upon unions by virtue of their status as the workers’ exclusive collective
2 bargaining representative” that are preempted by the NLRA, or instead the sort of “additional
3 duties . . . beyond the normal incidents of the union-employee relationship” that escape
4 preemption. *See Adkins*, 526 F.3d at 539. Because, as discussed below, James’s FEHA claim
5 requires dismissal on its own merits, the Court need not resolve the question of preemption at this
6 time.

7 The Court is not persuaded that James’s allegations are too conclusory to allege
8 discrimination. FEHA discrimination claims against unions under section 12940(b) are analyzed
9 under substantially the same standard as discrimination claims against employers under FEHA or
10 Title VII. *See Madsen v. Associated Chino Tchrs.*, 317 F. Supp. 2d 1175, 1180 (C.D. Cal. 2004)
11 (consideration a claim for discrimination based on religion). At summary judgment, the claim
12 would be subject to the *prima facie* case and burden shifting frameworks of *McDonnell Douglas*
13 *Corp. v. Green*, 411 U.S. 792 (1973). *See Madsen*, 317 F. Supp. 2d at 1181. The Ninth Circuit
14 has made clear, however, that even after *Iqbal*, a complaint asserting a discrimination claim need
15 not meet that test to survive a motion under Rule 12(b)(6) so long as it supports a plausible
16 inference of discrimination. *Austin v. Univ. of Or.*, 925 F.3d 1133, 1137 (9th Cir. 2019);
17 *Drevaleva v. Dep’t of Veterans Affs.*, 835 F. App’x 221, 223 (9th Cir. 2020). James alleges that
18 the Union failed to provide him and another African American driver the same representation it
19 provided non-African American employees facing discipline, despite knowing that James’s and
20 the other driver’s terminations were based on forged documents. Compl. at 11–12. These
21 allegations are sufficient to meet the standard of Rule 8(a) and *Iqbal*.

22 Whether James has sufficiently alleged discrimination does not end the inquiry of whether
23 he may proceed on a FEHA claim. “Under FEHA, a plaintiff must exhaust his or her
24 administrative remedies by filing a complaint with a state investigatory agency before bringing a
25 civil suit.” *Coleman v. S. Wine & Spirits of Cal., Inc.*, No. 11-00501 SC, 2011 WL 5520983, at *4
26 (N.D. Cal. Nov. 14, 2011) (citing *Cole v. Antelope Valley Union High Sch. Dist.*, 47 Cal. App. 4th
27 1505, 1509–1510 (1996)). James attached to his complaint a right-to-sue letter from the federal
28 EEOC. Compl. ¶ 22. Such letters generally permit a plaintiff to bring a claim under Title VII, but

1 do not satisfy the separate requirement under California law that in order to bring a claim under
2 FEHA, a plaintiff must generally receive a right-to-sue letter from the California Department of
3 Fair Employment and Housing (“DFEH”). A right-to-sue letter from the EEOC is not a substitute
4 for a right-to-sue letter from the DFEH for the purpose of state law claims under FEHA. *Martin v.*
5 *Lockheed Missiles & Space Co.*, 29 Cal. App. 4th 1718, 1726 (1994).

6 Based on cross-filing agreements between the EEOC and the DFEH, an administrative
7 charge filed with the EEOC might in at least some circumstances also place the DFEH on notice
8 of a plaintiff’s claims. *See Reed v. UBS Sec., LLC*, No. C 09-5237 MHP, 2010 WL 3119200, at
9 *2–4 (N.D. Cal. Aug. 3, 2010). Even so, California law allows the DFEH a period of one year
10 before it is required to act on such a claim, *id.* at *4, and James has not alleged either that he
11 received a right-to-sue letter from the DFEH or that a year passed without the DFEH taking action
12 on his claim.

13 The Court declines to consider James’s assertions in his “motion not to dismiss” that he
14 “filed a timely charge against defendant with the DFEH alleging, interiliac [sic], retaliation” and
15 “received from the DFEH notification of his right to sue.” Opp’n at 10. Subject to narrow
16 exceptions for judicial notice not applicable here, review under Rule 12(b)(6) is limited to the
17 allegations of a complaint, and “‘new’ allegations contained in [an] opposition motion . . . are
18 irrelevant for Rule 12(b)(6) purposes.” *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1
19 (9th Cir. 1998). Moreover, James suggests he filed an administrative complaint for retaliation
20 rather than discrimination, and his assertion that he exhausted his remedies is likely too conclusory
21 to be credited even if had been included in his complaint.

22 James’s FEHA claim is therefore DISMISSED for failure to allege compliance with
23 FEHA’s administrative exhaustion requirement, with leave to amend if he can allege such
24 compliance. If James wishes to pursue his claim under FEHA, he must file an amended complaint
25 addressing the circumstances of his administrative complaint in more detail, including whether his
26 administrative complaint encompassed a discrimination claim against the Union, and whether and
27 when he received a right-to-sue letter from the DFEH. James may wish to attach his
28 administrative complaint and right-to-sue letter, if any, to his amended complaint.

1 If James is able to amend to cure this deficiency regarding administrative exhaustion, the
2 Court will consider at that time whether his FEHA claim is preempted by the federal duty of fair
3 representation.

4 **D. James Fails to Provide Sufficient Notice of Any Other Claim**

5 James's complaint includes fleeting references to other legal theories, such as defamation
6 and fraud. It is not entirely clear from his complaint whether James wishes to pursue those claims
7 or what factual allegations he bases them on. While the Federal Rules of Civil Procedure "do not
8 countenance dismissal of a complaint for *imperfect* statement of the legal theory supporting the
9 claim asserted," they require at least "'a short and plain statement of the claim showing that the
10 pleader is entitled to relief.'" *See Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (quoting Fed.
11 R. Civ. P. 8(a)(2)) (emphasis added). A claim sounding fraud must also comply with the
12 particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which call for
13 more specific factual allegations than required for other claims. James's complaint, with its
14 compilation of various state court forms and a narrative section that only clearly asserts a claim for
15 race discrimination, does not sufficiently put the Union on notice of any other claims. Those
16 claims are DISMISSED with leave to amend.

17 James's "motion not to dismiss," while not presented as a complaint and perhaps deficient
18 in substance, follows the general format for a complaint in federal court.⁸ Any amended
19 complaint filed in response to this order should consist of consecutively numbered paragraphs
20 setting forth all factual allegations relevant to James's claims, followed by sections setting forth
21 each claim James wishes to assert, and concluding with a prayer for relief.

22 **IV. CONCLUSION**

23 For the reasons discussed above, James's complaint is DISMISSED with leave to amend.
24 If James believes that he can cure the defects identified in this order, he may file an amended
25 complaint no later than September 24, 2021. Any amended complaint must include the caption

26
27 ⁸ To the extent that the "motion not to dismiss" could potentially be construed as an amended
28 complaint, the Court declines to do so since it is not captioned as such, and James has an
opportunity to assert whatever claims he wishes to pursue in a true amended complaint in response
to this order.

1 and case number (21-cv-03893) appearing on this order and the words “FIRST AMENDED
2 COMPLAINT” on the first page, and must comply with Rules 8 and 10 of the Federal Rules of
3 Civil Procedure. Because an amended complaint completely replaces the previous complaint, any
4 amended complaint may not incorporate claims or allegations of James’s original complaint by
5 reference, but instead must include all of the facts and claims James wishes to present and all of
6 the defendants he wishes to sue. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

7 James, who is not represented by counsel, is encouraged to contact the Federal Pro Bono
8 Project’s Pro Se Help Desk for assistance if he continues to pursue this case. Lawyers at the Help
9 Desk can provide basic assistance to parties representing themselves but cannot provide legal
10 representation. Although in-person appointments are not currently available due to the COVID-19
11 public health emergency, James may contact the Help Desk at (415) 782-8982 or
12 FedPro@sfbar.org to schedule a telephonic appointment.

13 **IT IS SO ORDERED.**

14 Dated: August 16, 2021

15 
16 JOSEPH C. SPERO
17 Chief Magistrate Judge